DEPARTMENT OF TRANSPORTATION

[Docket OST-2000-7800]

RIN: 2105-AC94

Statement of Policy on Alternative Dispute Resolution

AGENCY: Department of Transportation, Office of the Secretary

ACTION: Statement of Policy

SUMMARY: The Department of Transportation publishes this Statement of Policy to further its commitment to using alternative dispute resolution (ADR) to advance national transportation goals by preventing, minimizing, and resolving disputes among our employees and with external parties, in a mutually acceptable and cost-effective manner. This policy statement announces the Department's continuing interest in collaborative problem-solving.

DATES: This notice is effective [upon publication in the Federal Register]

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SUPPLEMENTARY INFORMATION:

Statement of Policy on Alternative Dispute Resolution (ADR)

ADR is a collaborative, consensual dispute resolution approach. It describes a variety of problem-solving processes that are used in lieu of litigation or other adversarial proceedings to resolve disagreements. ADR encompasses mediation, facilitation, conciliation, factfinding, mini-trials, negotiation, negotiated rulemaking, neutral evaluation, policy dialogues, use of ombuds,

arbitration, and other processes that usually involve a neutral third party who assists the parties in preventing, minimizing the escalation of, and resolving disputes. The efficient and effective use of ADR will help us resolve disputes at an early stage, in an expeditious, cost-effective, and mutually acceptable manner.

The Department of Transportation is committed to advancing our national transportation goals though alternative dispute resolution. We will consider using ADR in all areas including workplace issues, formal and informal adjudication, issuance of regulations, enforcement and compliance, issuing and revoking licenses and permits, contract and grant award and administration, litigation brought by or against the Department, and other interactions with the public and the regulated community.

We will ensure that neutrals disclose any actual or potential conflicts of interest.

We will provide learning and development opportunities for our employees so that they will be able to use conflict resolution skills, understand the theory and practice of ADR, and apply ADR appropriately.

We will use a variety of evaluation and assessment strategies to measure and improve our processes and our use of ADR.

We will allocate resources to support the use of ADR.

We will provide confidentiality consistent with the provisions of the Administrative Dispute Resolution Act and other applicable Federal laws.

The Department will attempt to incorporate ADR in its dispute resolution, or as appropriate, rulemaking processes. In addition, either on our own initiative or in response to a request, the Department will examine the appropriateness of using ADR on a case-by-case basis.

ADR is voluntary and the Department will not impose its use on parties. The decision-making on when to use ADR should reflect sound judgment that ADR offers the best opportunity to resolve the dispute. In appropriate disputes, the Department will use ADR in a good-faith effort to achieve consensual resolution. However, if necessary, we will litigate or participate in some other process to resolve a dispute.

We will work together, internally and with external stakeholders and experts, to further ADR use across the Department. However, decision-making on incorporating ADR into dispute resolution processes, using ADR to resolve a particular dispute, and allocating resources rests with the Department's operating administrations, secretarial offices, or Office of the Inspector General.

We are committed to eliminating all barriers to equal opportunity for all employees and persons who participate in our programs. A disability on the part of one or more parties otherwise willing to use ADR will not act as a bar to its use.

All employees and persons who interact with the Department are encouraged to identify opportunities for collaborative, consensual approaches to dispute resolution or rulemaking.

Background

As the Department of Transportation strives to meet national transportation goals, we recognize the need to collaborate, to work together in the spirit of cooperation, and to form partnerships, internally and externally. Experience at the Department, in other Federal agencies, and in the private sector shows that alternative means of dispute resolution can achieve mutually acceptable solutions more effectively than traditional, non-collaborative processes. Mediation,

facilitation, conciliation, factfinding, mini-trials, negotiation, negotiated rulemaking, early neutral evaluation, policy dialogues, use of ombuds, arbitration, and other processes that usually involve a neutral third party who assists the parties in preventing and resolving disputes, when used effectively, will help us resolve potential conflicts and disputes at an early stage and in an expeditious, cost-effective manner. These approaches to problem-solving are not just "alternatives," but an integral part of the way we do business at the Department. We are issuing this statement of policy on the use of alternative dispute resolution to further our commitment to its use.

For purposes of this initiative, "the Department" or "we" refers to the Office of the Secretary, the operating administrations (the United States Coast Guard, the Federal Aviation Administration, the Federal Highway Administration, the Federal Motor Carrier Safety Administration, the Federal Railroad Administration, the National Highway Traffic Safety Administration, the Federal Transit Administration, the Maritime Administration, the Saint Lawrence Seaway Development Corporation, the Research and Special Programs Administration, the Transportation Security Administration, the Bureau of Transportation Statistics, and the Transportation Administrative Services Center), and the Office of Inspector General.

On November 15, 2000, the Department published an interim policy statement on the use of alternative dispute resolution (65 FR 69121). The Department requested comment on the statement, on how to incorporate ADR into our processes, and how to encourage its use in appropriate circumstances. The Department also requested input on areas of agency activity that would benefit from a dispute resolution process that incorporates ADR techniques. The

Department noted the following areas for consideration: workplace issues, formal and informal adjudication, issuance of regulations, enforcement and compliance, issuing and revoking licenses and permits, contract and grant award and administration, litigation brought by or against the Department, and other interactions with the public and the regulated community.

Response to Request for Comments

In response to the request, the Department received seven comments. Commenters included private neutrals; an attorney representing clients in various motor carrier related activities; a State department of transportation; and the American Bar Association, Commission on Mental and Physical Disability Law, Subcommittee on Disability Dispute Resolution and Mediation.

None of the commenters objected to the initiative and some were very supportive of the Department's efforts. For example, one commenter noted that "once tried, ADR proves to be a valuable method to resolve difficult issues, disputes, discrepancies and squabbles." Another stated that ADR "can often conserve all the participants' time, energy, and resources (and costs associated with them), speed the time for resolution of matters, and smooth over some of the rougher edges created by the adversarial nature of many of the matters in which DOT is involved."

Some commenters offered suggestions and recommendations for clarifying and strengthening the policy. Their comments and the Department's response follow.

<u>ADR is Voluntary</u>

One commenter suggested that the Department add to the section on "No Creation of Rights" that the Department "would not require or impose the use of ADR on an unwilling

private sector entity or employee."

The Department agrees that ADR is voluntary and there must be mutual agreement to use it. ADR cannot work unless the users of it want it to work and want to use it. Therefore, the Department has included a statement on the voluntary nature of ADR in its policy statement and in the section on "No Creation of Rights."

Litigation

One commenter noted that the Interim Statement of Policy said that the Department will use ADR to resolve litigation. The commenter suggested that we clarify whether the Department has the ability or the authority to use ADR to resolve a matter in litigation or whether the Department of Justice makes that decision.

The Department of Transportation works closely with the Department of Justice to ensure that the interests of the United States are fully and properly represented. Together, we determine whether litigation should be initiated and whether adverse decisions should be appealed. Likewise, we determine whether ADR would be appropriate in particular cases. Furthermore, with the passage of the Alternative Dispute Resolution Act of 1998, in which Congress directed all Federal courts to establish ADR programs, continued growth in ADR usage by the Federal government in litigation matters is highly likely. The Department of Justice estimates that its use of ADR has quadrupled from 5 years ago to more than 2000 cases in FY 2000.

Administrative Enforcement Proceedings

An attorney representing clients in various motor carrier related activities recommended that the Department consider using ADR in motor carrier enforcement proceedings. He provided three reasons in support of this position. First, he noted that ADR results in cost savings.

Second, he stated that "to the extent the resolution of enforcement matters may be speeded up by ADR, this has the benefit of a quick response to a perceived safety problem." Third, he said that "ADR can frequently take the rough edges off of adversarial proceedings . . . When one is engaged in a bitter dispute, one may lose sight of the greater purpose." Referring to the FMCSA enforcement decisions as reported on the Department's Docket Management System, he noted that "the tenor of the pleadings on both sides often appears to be bitter, going well beyond the mere assertion of different, conflicting arguments about what the law requires and what penalty, if any, should be imposed."

While the commenter referred to the FMCSA enforcement program, the Department considered the appropriateness of ADR for all its administrative enforcement proceedings. The Department is committed to concluding its administrative enforcement proceedings as fairly, effectively, efficiently, and expeditiously as possible. The Department will use ADR as an opportunity to further develop and refine its processes to achieve less costly, less contentious, and more timely decisions when appropriate. Parties to any enforcement proceeding, both Departmental personnel and regulated entities, are encouraged to identify cases that are appropriate for a variety of ADR techniques, including mediation, early neutral evaluation, and arbitration. The interim statement of policy included a list of ADR considerations. For the ease of those wishing to determine whether ADR may be appropriate, these considerations are included in the Appendix. As noted below, a party may want to explore the possibility of using ADR without talking with their immediate adversary. Therefore a list of ADR contacts is available on the Department's ADR web site: www.dot.gov/adr. However, ADR is voluntary and there must be mutual agreement to use it.

Evaluation

One commenter suggested that the evaluation of ADR should include a comparison of the traditional processes. The commenter noted that "if ADR were evaluated alone, it might look pretty terrible since no one in particular likes conflict and ADR is both that and requires the expenditure of resources that people would just as soon not spend; but, as compared to litigation and traditional rulemaking, it is highly likely that it will be viewed quite positively."

Evaluation is an important component of an ADR program. The Department will use a variety of evaluation and assessment strategies to provide valid and reliable information for measuring and improving performance. Depending on the ADR program, we may look at the number of attempts to use ADR, the number of resolutions, customer satisfaction with the process, the neutral, and /or the resolutions, estimated cost- and/or time-savings, or whether the program is meeting its stated goals. The Department agrees that evaluating ADR without evaluating traditional processes may lead to a distorted and inaccurate picture. In FY 2001, the Department's Dispute Resolution Council conducted a program evaluation of the Department's use of mediation to resolve complaints of discrimination. As a result of this effort, the evaluation found that the costs associated with traditional processes are not usually readily available. We will attempt to estimate those costs when evaluating ADR use, even if based on anecdotal information and non-quantifiable data.

Confidentiality

One commenter complimented the Department on the way confidentiality was addressed.

The Department recognizes the importance of confidentiality. In some instances, many of the benefits of ADR can be realized only through confidential proceedings. Confidentiality

ensures that the parties may speak freely with a neutral who will not disclose their confidences to other parties or to the outside world. Without that assurance, the parties may be unwilling to freely discuss their interests and possible settlements with the neutral. Confidentiality also allows the parties to raise sensitive issues and discuss creative ideas and solutions that they would be unwilling to discuss publicly.

Although negotiated rulemaking is a process conducted under the Federal Advisory Committee Act at public meetings that have been announced in the Federal Register, confidentiality may also be a consideration for the participants. For example, a convenor who impartially assists an agency in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate may agree not to disclose the identity of a party who raises a particular concern about an agency. Information shared in caucuses may also be confidential.

The Administrative Dispute Resolution Act generally provides that communications (including a neutral's notes and documents prepared for the proceedings) between a neutral and the parties must be kept confidential by the neutral and the parties, unless certain specific exceptions exist. A court may require disclosure of such information if it is necessary to prevent a manifest injustice, help establish a violation of law, or prevent harm to the public health or safety. The injustice, violation, or harm must be of a sufficient magnitude in the particular case to outweigh the integrity of the dispute resolution proceedings. In addition, other Federal laws may impact the confidentiality of information in specific cases.

Working Together

One commenter questioned the meaning of the statement in the Interim Statement of Policy on ADR: **"**We will work together to further ADR.**"** The commenter requested that the

Department clarify whether the statement was intended to apply to the Department and its employees or whether it referred to the Department working with affected interests on the outside. The commenter suggested that an inclusion of outside interests, both stakeholders and experts, be made explicit.

The Department has adopted this suggestion and the statement of policy reads accordingly.

Persons with Disabilities

The American Bar Association, Commission on Mental and Physical Disability Law, Subcommittee on Disability Dispute Resolution and Mediation, suggested that the Department incorporate the provisions of the ADA Mediation Guidelines (http://www.cardozo.yu.edu/cojcr/guidelines) or adopt some modifications of the Guidelines to meet the Department's needs. Under the Guidelines, "ADA mediation" means programs mediating claims arising under the Americans with Disabilities Act and other disability civil rights statutes. The Guidelines address issues in the areas of program and case administration, process, training, and ethics.

The Department is committed to eliminating all barriers to equal opportunity for all employees of the Department, for all applicants for jobs in the Department, and for the persons who participate in the Department's programs, services, and activities. The Department will comply with Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability and requires our programs, activities, and facilities to be accessible, subject to the limitations contained within the statute and our regulations. A disability on the part of one or more parties otherwise willing to use ADR will not act as a bar to its use. The Department will

bear the cost of these accommodations. As particular ADR programs are established, we will consider whether to fully incorporate the ADA Mediation Guidelines.

Requesting the Department to Consider ADR

One commenter suggested that we provide persons who are potentially interested in using ADR with a way of exploring the possibility of its use. The commenter noted that parties should be able to explore the potential for using ADR without talking with their immediate adversary.

The Department agrees. We have updated the Department's ADR web site (www.dot.gov/adr) to include information about the Department's Dispute Resolution Council and contact information for the Department's Dispute Resolution Specialist and the Deputy Dispute Resolution Specialists in each of the operating administrations and the Office of Inspector General.

Internal vs. External Neutrals

One commenter recommended that the Department rely on outside contractors to serve as neutrals in ADR proceedings. The commenter stated that in-house staff may "have an opinion about the general nature of the problem and therefore may not be neutral." In addition the commenter noted that there may be a perception of bias by the parties. Another commenter noted that the United States Postal Service has successfully used private mediators to resolve employment disputes and that feedback from employees and management has been extremely positive.

In using a variety of ADR techniques, the Department has relied upon both internal and external neutrals. For example, the Department established a mediation program to resolve EEO complaints, in which employees serve as mediators as a collateral duty to their assigned

positions. In addition, depending upon the availability of Departmental employees or to avoid conflicts of interest, private mediators have been used. In litigation, the Department has used private mediators. The Department of Justice has noted that private mediators are the best source of mediators for government cases. In the area of environmental ADR, the Department is considering external neutrals. The U.S. Institute for Environmental Conflict Resolution is assembling a roster of qualified dispute resolution and consensus building professionals with particular experience in transportation cases. The Institute will draw from its roster of qualified neutrals with substantial experience in environmental conflict resolution. This Transportation Roster is part of an ADR system designed through an interagency agreement with the Federal Highway Administration. For most negotiated rulemakings, the Department has generally relied upon outside neutrals. However, internal neutrals have been used to convene and facilitate negotiated rulemaking when parties were interested in the process, but there was a lack of funding to pay for an outside neutral.

The Department will continue to make a determination of whether to use an internal or external neutral on a case-by-case basis, considering a variety of factors, including costs. As a practical matter, in some instances, the Department may be choosing between in-house neutrals or no ADR process. In response to the comment, we have added a provision to the policy statement that neutrals will disclose actual and potential conflicts of interest. This is consistent with the Model Standards of Conduct for Mediators that have been approved by the American Arbitration Association, the Litigation Section and the Dispute Resolution Section of the American Bar Association, and the Society of Professionals in Dispute Resolution.

Environment

Appendix II to the Interim Statement of Policy (65 FR 69125) provided examples of a variety of the Department's ADR initiatives. The environmental example noted that, with the assistance of the U.S. Institute for Environmental Conflict Resolution, a Federal agency created to assist parties in resolving environmental conflicts around the country that involve Federal agencies or interests, the Federal Highway Administration (FHWA) is working on developing an ADR system that would be applied during the National Environmental Policy Act (NEPA) process. One State department of transportation (the State) commented on the example. The State welcomed the use of ADR as long as it has the discretion to participate in ADR, without the risk of losing Federal funds. The State is concerned that the Department may create a policy implementing ADR that would mandate or compel the use of ADR to resolve disputes.

A copy of the State's comments was provided to FHWA for its consideration and, as this effort continues, FHWA will continue to consider input. Draft documents relating to FHWA's initiative will be posted for review and comment on its environmental streamlining website http://www.fhwa.dot.gov/environment/strmlng.htm. For additional information, you may call Lucy Gariliauskas at 202-366-2068 or Fred Skaer at 202-366-2058. You may write to them at FHWA, Office of National Environmental Policy Act Facilitation, 400 Seventh Street, SW, Washington, DC 20590.

List of ADR Considerations

The interim statement of policy included a list of ADR considerations. The Department did not receive any comments on that list. For the ease of those wishing to determine whether ADR may be appropriate, these considerations are included in the Appendix.

Legal Authority

This policy statement is issued pursuant to the Administrative Dispute Resolution Act of 1996, 5 U.S.C. 571-583, which authorizes and encourages Federal agencies to use consensual means of dispute resolution as alternatives to traditional dispute resolution processes. The Act defines alternative means of dispute resolution as "any procedure that is used to resolve issues in controversy..." It defines "issue in controversy" as "an issue which is material to a decision concerning an administrative program of an agency, and with which there is disagreement..." The Act requires that each Federal agency adopt a policy that addresses the use of ADR and appoint a Dispute Resolution Specialist. Congress enacted the Administrative Dispute Resolution Act to reduce the time, cost, inefficiencies, and contentiousness that too often are associated with litigation and other adversarial dispute resolution mechanisms.

This policy is also consistent with several other Federal statutes and regulations.

The Negotiated Rulemaking Act of 1996, 5 U.S.C. 561-570, establishes a framework for use of negotiated rulemaking. Congress enacted the Negotiated Rulemaking Act to increase the acceptability and improve the substance of rules, making it less likely that the affected parties will challenge the rules or resist enforcement.

The Alternative Dispute Resolution Act of 1998, 28 U.S.C. 651-658, directs all Federal courts to establish ADR programs.

The Contracts Disputes Act, 41 U.S.C. 605(d) and (e), permits the use of ADR for resolving claims.

The FAA's Procedures for Protests and Contracts Disputes, 14 CFR Part 17, encourages the use of ADR as the primary means of resolving procurement related disputes.

The Federal Sector Equal Employment Opportunity Regulations, 29 CFR Part 1614 requires agencies to establish or make available an ADR program. The ADR program must be available during both the pre-complaint process and the formal complaint process.

Relationship to other Dispute Resolution Procedures

This policy statement replaces the Interim Statement of Policy on Alternative Dispute Resolution published in the Federal Register on November 15, 2000. It does not supersede collective bargaining agreements or other statutory, regulatory, or contractual dispute resolution procedures, or military disciplinary processes. ADR is intended to supplement, not replace, existing procedures.

No Creation of Rights

ADR is voluntary. The choice of when and how to use ADR is within the discretion of the Department's Operating Administrations and Secretarial offices, and all parties must agree. This statement of policy does not create any right to judicial review involving the compliance or noncompliance with the statement. In addition, the statement does not obligate the Department to offer funds to settle any case, to accept a particular settlement or resolution of a dispute, or to alter any existing delegation of settlement or litigation authority.

Issued in Washington, DC on _____

Norman Y. Mineta
Secretary of Transportation

Appendix -- ADR Considerations

A decision to use ADR may be made before or after a dispute arises. Several factors should be considered in making that decision. Some factors may favor the use of ADR while others may weigh against it. Although not intended as an exhaustive list of factors, the Department has determined that ADR may be helpful in resolving a particular dispute where one or more of the following factors are present:

1. Identifiable Parties. There is an identifiable group of constituents with interests (the parties) so that all reasonably foreseeable interests can be represented.

2. Good Faith. The parties are willing to participate in good faith.

3. Communication. The parties are interested in seeking agreement, but poor communication or personality conflicts between the parties adversely affect negotiations.

4. Continuing Relationship. A continuing relationship between the parties is important and desirable.

5. Issues. There are issues that are agreed to be ripe for a negotiated solution.

6. Unrealistic View of the Issues. The parties' demands or views of the issues are unrealistic. A discussion of the situation with a neutral may increase the parties' understanding and result in more realistic alternatives and options.

7. Sufficient Areas of Compromise. There are sufficient areas of compromise to make ADR worthwhile.

8. Expectation of Agreement. The parties expect to agree eventually, most likely before reaching the courtroom or engaging in other adversarial processes.

9. Timing. There is sufficient time to negotiate and ADR will not unreasonably delay the

outcome of the matter in dispute. There is a likelihood that the parties will be able to reach agreement within a fixed time. There are no statutory or judicial deadlines that are adversely affected by the process. ADR may result in an earlier resolution of the dispute.

10. Resources. The parties have adequate resources (budget and people) and are willing to commit them to the process.

While many of these factors may apply to agency rulemaking, there may be some variation in the consideration. For example, with regard to "Expectation of Agreement," the consideration may be that all affected interests recognize that there is a problem that must be solved and that Federal regulation is the appropriate response. Furthermore, under the Negotiated Rulemaking Act, the head of the agency would determine whether negotiated rulemaking is in the public interest and would consider several factors concerning the parties, the timing, the costs, and the issues. See 5 U.S.C. 561.

There are also factors that suggest that ADR should not be used. The Administrative Dispute Resolution Act of 1996 provides factors that suggest that ADR is inappropriate or may not be productive in a particular dispute resolution proceeding. See 5 U.S.C. 572.